INDEX

CITATIONS

253073—40——1

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 271

CHARLES H. ALBERS, AS RECEIVER OF WOODLAWN TRUST AND SAVINGS BANK, A CORPORATION, PETITIONER

v.

JAMES A. FARLEY, HENRY MORGENTHAU, JR., AND ROBERT H. JACKSON, AS TRUSTEES OF THE POSTAL SAVINGS SYSTEM; WILLIAM A. JULIAN, AS TREASURER OF THE UNITED STATES OF AMERICA; AND WILLIAM A. JULIAN, AS TREASURER OF THE BOARD OF TRUSTEES OF THE POSTAL SAVINGS SYSTEM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Court of Appeals for the District of Columbia (R. 112–119) is reported in 112 F. (2d) 401.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered April 29, 1940 (R. 120). The petition for a writ of certiorari was filed July 22, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the United States is an indispensable party defendant to a suit by a receiver of a state bank against the trustees and treasurer of the Postal Savings System to recover securities and the proceeds thereof which were pledged by the bank to secure deposits of postal savings funds.

STATUTES INVOLVED

The pertinent portions of the Postal Savings Bank Act are set forth in the Appendix.

STATEMENT

The Woodlawn Trust and Savings Bank was duly organized as a banking corporation under the laws of Illinois in 1905, and thereafter operated as a state bank in Chicago, Illinois (R. 22, 43). Postal savings funds were deposited in the bank from time to time between 1911 and 1932, and the bank, to secure the repayment of the deposits, delivered various bonds, which were part of its assets, to the Treasurer of the United States (R. 22). In

1932 the state auditor of Illinois found that the capital stock of the bank was impaired, and accordingly, took possession of the bank and appointed a receiver (R. 22, 43–44).[1] When the bank closed it held postal savings deposits to the amount of $454,793.04, no part of which has been repaid (R. 25).

On April 14, 1938, the date of the decree of the District Court, William Julian, Treasurer of the United States and *ex officio* Treasurer of the Board of Trustees of the Postal Savings System (R. 22, 43), held as security from the bank bonds in the aggregate principal amount of $457,500 (R. 22–25). He held the proceeds of other bonds also deposited as security, which had either matured or were redeemed, in the amount of $16,000 (R. 25). In addition he had received $90,657.96 interest on the pledged bonds, which he had credited to the Board of Trustees of the Postal Savings System (R. 25).

On October 28, 1935, William L. O'Connell, petitioner's predecessor as receiver of the bank, brought suit in the District Court for the District of Columbia against the Postmaster General, the Attorney General, and the Secretary of the Treas-

[1] H. C. Vernon was appointed receiver on July 1, 1932, and upon his resignation William L. O'Connell, original plaintiff in this action, was appointed receiver. After the death of O'Connell on July 24, 1936, Charles H. Albers, petitioner, was appointed receiver and substituted as party plaintiff (R. 21, 22, 43, 44).

ury, as trustees of the Postal Savings System, and against the Treasurer of the United States in that capacity and as Treasurer of the Board of Trustees of the Postal Savings System, for the recovery of the pledged bonds or their proceeds, plus interest thereon amounting to $106,657.96 (R. 1–14). The basis of the suit was that under Illinois law [2] the bank had no power to pledge assets to secure deposits (R. 1–13). The District Court granted the relief requested. It ordered the defendant Julian, as Treasurer of the United States, to turn over to petitioner as receiver of the bank the pledged bonds in his possession (R. 31–33), and ordered the trustees to pay, or cause to be paid, out of postal savings funds, $106,657.96 and any additional money received as principal or interest on the bonds (R. 33–34). The District Court held that the suit was not against the United States and that the United States was not an indispensable party defendant (R. 29). On appeal, the United States Court of Appeals for the District of Columbia reversed on the ground that the United States was an indispensable party defendant (R. 112–119).

ARGUMENT

The Court of Appeals held that the suit might not be maintained in the absence of the United States as a party, because under the statutory struc-

[2] *People* v. *Wiersema State Bank*, 361 Ill. 75, 197 N. E. 537; *People* v. *Cairo-Alexander County Bank*, 363 Ill. 589, 2 N. E. (2d) 889.

ture of the Postal Savings System the United States had an interest in the pledged security, and was, therefore, an indispensable party to any suit to control its disposition, and because the suit sought to compel the respondents to exercise their official power over property held by them as officers of the United States.[3]

The decision below thus turned on the structure of the Postal Savings System. The system was established by the Postal Savings Bank Act, set out in the Appendix. Under the Act the system is administered by a board of trustees consisting of the Postmaster General, the Secretary of the

---

[3] It is, of course, well settled that a suit nominally against an officer is in reality a suit against the United States if the relief granted or sought will finally determine the right to property in which the United States has or claims an interest. *Belknap* v. *Schild*, 161 U. S. 10; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601; *Goldberg* v. *Daniels*, 231 U. S. 218, 221–222; *Louisiana* v. *Garfield*, 211 U. S. 70; *Morrison* v. *Work*, 266 U. S. 481, 485; *Louisiana* v. *Jumel*, 107 U. S. 711; *Lankford* v. *Platte Iron Works*, 235 U. S. 461. In the *Lankford* case a depositor in an insolvent state bank brought suit to compel payment of his deposit by the Oklahoma State Banking Board out of the Depositors' Guaranty Fund. The Court held that the suit was against the state since the state had legal title to the fund and had an interest that the fund be administered by the officers it had appointed.

It is likewise well settled that a suit cannot be maintained to control the conduct of officers in their official capacity. *Belknap* v. *Schild*, 161 U. S. 10, 25; *Hagood* v. *Southern*, 117 U. S. 52, 69; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 457; *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 296. Suits to require the performance of a ministerial duty are, of course, an exception to this rule. See *Minnesota* v. *Hitchcock*, 185 U. S. 373, 386.

Treasury, and the Attorney General, acting *ex officio* (39 U. S. C., § 751). The trustees submit a report to Congress at each session (*id.*). Mail matter pertaining to the business of the system enjoys franking privilege (39 U. S. C., § 752). Every post office designated by the Postmaster General is a postal savings depository office (39 U. S. C., § 753). The Act makes detailed provision for deposits, at interest, and for withdrawals (39 U. S. C., §§ 753–758). Postal savings funds are deposited, at interest, in solvent banks, except that a specified reserve is kept with the Treasurer of the United States, who is treasurer of the board of trustees (39 U. S. C., § 759). To insure the safety of deposited funds the Act directs the board of trustees to take security from the banks (*id.*). When, in the judgment of the President, the interests of the United States so require, the board of trustees may invest all the postal savings funds, except the reserve, in securities of the United States[4] (*id.*). Any profit from the system is to be covered into the Treasury of the United States as a part of the postal revenue[5] (*id.*). In some

[4] Pursuant to this provision almost one hundred million dollars werei nvested by the board in Liberty bonds during 1917–1919. H. Doc. No. 133, 67th Cong., 2d Sess., p. 3.

[5] We are informed by the Post Office Department that the total net profits of the operation of the system since its establishment amounted to more than $65,000,000 as of November 1939. And see Annual Reports of the Operations of the Postal Savings System, 1914–1939; Annual Report of the Postmaster General, 1939, pp. 36, 41, 97.

circumstances a depositor may surrender his deposit and receive United States bonds in lieu thereof (39 U. S. C., § 760). Postal savings depository funds are directed to be kept separate from other funds, and detailed provision is made for their safekeeping (39 U. S. C., §§ 762, 765). The Postmaster General is authorized to require postal employees to transact, in connection with their other duties, such postal savings depository business as may be necessary (39 U. S. C., § 764). "The faith of the United States is solemnly pledged to the payment of the deposits made in postal savings depository offices * * *" (39 U. S. C., § 766).

1. Petitioner contends (pp. 7–11, 23–26) that the decision below is in conflict with *Leka, Admx.* v. *United States,* 69 C. Cls. 79. That was a suit against the United States by an administrator to recover postal savings deposits made by the decedent.[6]

[6] While the suit was nominally against the United States, the controversy was in reality between rival administrators, each of whom was claiming the decedent's deposit. The Government, of course, had no interest in the controversy and the files of the Department of Justice show that no brief was filed for the United States, although the report of the case indicates that an appearance was entered for it. The opinion of the court reflects quite plainly that the court was influenced in its decision by the real nature of the controversy before it, inasmuch as it lacked jurisdiction to decide a controversy between private parties. The court seemed to feel that determination of the controversy between the administrators was, at least in the first instance, for the Postmaster. See 69 C. Cls. at 89.

253073—40——2

The Court of Claims held that the suit could not be maintained. It stated that the debt due on the deposit was not a liability of the United States payable out of its funds, but was payable out of the funds in the hands of the trustees of the Postal Savings System. The statutory provision pledging the faith of the United States to the payment of postal savings deposits, means, the court said, that the United States is pledged to make good any deficiency in the funds in the hands of the trustees, but does not mean that the United States can be sued by a depositor when there is no such deficiency. "The United States has nowhere in this act provided for a suit against it or consented to be sued. * * * The contract involved is not with the United States." 69 C. Cls. at 88.

In the case at bar the court said, in the course of its opinion, that the postal savings fund originated in the deposit of money "with the United States", that it was deposited "by the United States" in a bank and security was taken for its repayment; that the statute under which the deposit was received gave the President the right to invest it; and that the credit of the United States was pledged for its repayment (R. 118). And the court added (R. 118–119):

> This, at the very least, created as between depositor and government the relationship of debtor and creditor, and gave the United

> States full control of and full responsibility for its disposition.

Petitioner assumes (Pet. 8) that this statement was the basis of the holding that the United States was an indispensable party, and asserts that the decision below is thus in conflict with the *Leka* case on whether postal savings funds constitute money belonging to the United States and on whether a postal savings deposit creates a debt or liability of the United States.

In the first place, the opinion shows that the court did not mean to say that the United States as distinguished from its instrumentality, the Postal Savings System, was the debtor of the depositor and had control of and responsibility for the disposition of the deposit. Rather the court, in the quoted portion of its opinion, was considering the Postal Savings System a part of the United States Government, and had no distinction in mind between the system and the government proper. Thus the court spoke, in the same paragraph, of the deposit of money "with the United States", of the receipt of the money "by the United States", and of the deposit of the money in a bank "by the United States" for safekeeping (R. 118). It was, of course, the Postal Savings System with which the money was deposited and which in turn deposited it in a bank. Earlier in the opinion the court recognizes that the postal savings deposit was not public moneys "strictly speaking," al-

though it was "for all practical purposes money belonging to the United States" (R.119).[7]

In the second place, the quotations from the opinion below and from the *Leka* opinion upon which petitioner relies as establishing a conflict are but dicta. Whether the United States has assumed a contractual obligation to postal savings depositors on which it may be sued under the Tucker Act—the question presented in the *Leka* case—is not decisive of whether the United States is an indispensable party to a suit to reach securities given to secure deposits of postal savings funds. Compare *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, with *Minnesota* v. *United States*, 305 U. S. 382, 386. The court below held that the United States was an indispensable party because the suit sought to establish title to property in which the United States had an interest, and because the suit sought to control the official activities of federal officers. Neither ground is dependent upon the existence of a contractual obligation between the United States and postal savings depositors on which the former could be sued in the Court of Claims.

---

[7] The court referred to the opinion of this Court in *Inland Waterways Corp.* v. *Young*, decided March 25, 1940, in which this Court referred to postal savings funds, among others, as "deposits of a governmental nature", and stated that funds of government corporations "are, for all practical purposes, Government funds; the losses, if losses there be, are the Government's losses."

2. Petitioner also asserts that the decision below is in conflict with various enumerated decisions of this Court. None of the cases cited is in conflict with the decision below; most are not even particularly relevant to it.

Many of the cited cases hold or assume that some particular federal instrumentality is suable. *United States Bank* v. *Planters' Bank*, 9 Wheat. 904; *National Bank* v. *Commonwealth*, 9 Wall. 353; *Davis* v. *Elmira Savings Bank*, 161 U. S. 275; *Sloan Shipyards* v. *United States Fleet Corporation*, 258 U. S. 549; *Merchant Fleet Corporation* v. *Harwood*, 281 U. S. 519; and *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381. In such cases the question is whether Congress intended that the instrumentality should enjoy the Government's immunity, and the intention, if not expressed, is to be determined by consideration of various relevant circumstances. In the case at bar there is no express congressional consent to suit against the trustees, and petitioner does not point to any circumstance from which an implied consent is to be inferred. Rather, petitioner asserts broadly that instrumentalities of the United States are suable, and that the United States is not an indispensable party to suits against them.

Osborn v. *United States Bank*, 9 Wheat. 738, and *Davis* v. *Gray*, 16 Wall. 203, were held not to be suits against the sovereign on the ground that that question was to be determined by the party

named as defendant, but this rule has long been discarded. See *In re Ayers,* 123 U. S. 443, 487. *Houston* v. *Ormes,* 252 U. S. 469, and *Mellon* v. *Orinoco Iron Co.,* 266 U. S. 121, were suits against officers to require the performance of a ministerial duty imposed by Act of Congress. *United States* v. *Lee,* 106 U. S. 196, and *Tindal* v. *Wesley,* 167 U. S. 204, were ejectment actions against officials, and were maintainable against the officials in their individual capacities because an ejectment action does not litigate the title but only the right to possession of the defendant, so that the United States would not be bound by a judgment in ejectment against its officers. See 106 U. S. at 217, 222; 167 U. S. at 223; *Carr* v. *United States,* 98 U. S. 433, 437–438; *Hussey* v. *United States,* 222 U. S. 88, 93. As stated, note 3, *supra,* p. 5, it is well settled that a suit against an official of the United States to litigate title to property held by the official for the United States—and that is what, in essence, the present action is—is a suit against the United States, and cannot be maintained. Similarly *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, was not a suit to adjudicate title to property, but was brought to enjoin allegedly illegal interference by an official with the plaintiff's property.

CONCLUSION

The decision below is correct and follows principles well settled in the decisions of this Court.

There is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
PAUL A. SWEENEY,
Special Assistant to the Attorney General.
THOMAS E. HARRIS,
WALTER S. SURREY,
Attorneys.

AUGUST 1940.